No. 12257

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD R. BIGGS, JOHN R. HECTOR, H. J. LUEDER and MARTIN M. MORENO,

Appellants,

vs.

JOSHUA HENDY CORPORATION,

Appellee.

BRIEF OF APPELLEE AND CROSS-APPELLANT.

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BRIEF OF APPELLEE AND CROSS-APPELLANT.[1]

PART I—REPLY TO APPELLANTS' OPENING BRIEF.

I.

Basis of Original and Appellate Jurisdiction.

This is an appeal from the final judgment [Tr. pp. 26-28] and the Findings of Fact and Conclusions of Law [Tr. pp. 15-26] entered in this proceedings by the United States District Court for the Southern District of California, Central Division, on February 21, 1949.

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[1]This brief is in two parts; the first part is appellee's reply brief and the second part is cross-appellant's brief.

Appellants contended in the District Court that said Court had jurisdiction of this action under the Fair Labor Standards Act of 1938 (Public Law 718, 75th Cong., 52 Stat. 1060-69; 29 U. S. C. Secs. 201-219) and the provisions of Section 24(8) of the Judicial Code (28 U. S. C. Sec. 41(8)) [Tr. pp. 2-3]. Appellee contended in the District Court [Tr. p. 13] and now contends that the District Court did not have jurisdiction of this action by reason of Sec. 2(d) of the Portal-To-Portal Act of 1947 (Pub. Law 49, 80th Cong., Chap. 52; 29 U. S. C. A. 251), amending the Fair Labor Standards Act.

This Court has jurisdiction of the appeal and cross-appeal under provisions of Section 1291 of the Judicial Code and Judiciary (28 U. S. C. 1291).

II.
Statement of Facts.

Appellee will not restate the facts recited in appellants' Opening Brief (pp. 3-6) except as to certain corrections and additions deemed material.

All of the appellants were members of unions who were signatories to the closed shop (A. F. of L.) Master Labor Agreement [Ex. 1]. The unions had stewards at all times in the shipyard of appellee to see that said agreement was being complied with [Tr. pp. 43, 66, 77]. In fact, one of the appellants herein was a union steward [Tr. pp. 109-110]. Further, appellants knew that they were not receiving compensation for the lunch period time since their weekly pay checks set forth the exact number of hours

for which they were being paid [Tr. p. 46]. Yet during all of the war years in which the Master Labor Agreement [Ex. 1] was in effect, no complaint was ever filed by any union or employee, as to the claim appellants now assert, under the provisions for arbitration of complaints expressly provided in said Master Labor Agreement [Ex. 1] in Paragraphs 18 and 19 thereof [Tr. p. 95 *et seq.*].

Appellants had the right to attend their union meetings and complain of non-payment for their lunch periods, but no such complaints were made by them [Tr. pp. 48-49, 65, 76, 109-110].

The hourly rate of appellants was as shown on their time cards [Ex. E] set forth at the top of each man's time card [Tr. p. 150]. Prior to the work week ending November 19, 1944, the hourly rate of pay for swing and graveyard shifts did not include the one-half hour and one hour "allowed time" [Tr. p. 151] credited respectively upon the swing and graveyard shifts. After the work week ending November 19, 1944, no "allowed time" was credited and the actual hourly rate was increased for these two shifts [Tr. p. 152].

Prior to the work week ending November 19, 1944, it is incorrect, as appellants seek to do, to speak of the 10% and 15% shift premiums for swing and graveyard shifts, respectively, and the one-half hour and one hour "allowed time" as *both* being shift differentials (the term shift differential being used in the sense of an increase in the actual hourly rate of pay). Only the 10% and 15% shift

premiums were shift differentials [Tr. p. 151]. Appellants stated in their Opening Brief that in the case of *Mills v. Joshua Hendy Corporation* (C. C. A. 9th, 1948), 169 F. 2d 898, and also in the case at bar it was stipulated that the "allowed time" was a shift differential. Appellee respectfully believes that counsel is in error and that there is no such stipulation in either the *Mills* case, *supra,* or in the case at bar.

III.

Summary of Argument.

Appellants have already been properly compensated for the one-half hour lunch period on the swing and graveyard shifts as this Court expressly held in the *Mills* case, *supra,* upon the same pleadings and facts as are now before the Court in the case at bar. The 1949 amendments to the Fair Labor Standards Act affirms the *Mills* case, *supra.*

IV.
ARGUMENT.

Appellee agrees with appellants' contention that shift differentials cannot be used as a credit for overtime premium due under the Fair Labor Standards Act. However, appellee disagrees with appellants' reasoning that the one-half hour and one hour time credits on the swing and graveyard shifts, respectively, are shift differentials, that is, constitute higher hourly rates of pay.

The rates of pay of these appellants was set forth on their time cards [Tr. p. 150; Ex. E]. Appellants received their weekly pay checks showing the number of overtime hours for which they were being paid [Tr. p. 46]. Further, the second amended complaint of appellants affirmatively alleges these facts in practically the same language used in the complaint in the *Mills* case, *supra,* alleging in Paragraph IV [Tr. p. 4]:

> "In substantially all of the weeks in which plaintiffs and other employees similarly situated were employed, they were credited with having worked forty-eight (48) hours, for forty (40) hours of which they were paid at straight time, and eight (8) hours of which they were paid at time and one-half. In each week of their employment by the defendant, the plaintiffs and said other employees similarly situated worked hours in addition to said forty-eight (48) hours for which they were credited and paid, for which additional hours they were not credited and for which they received no compensation whatsoever."

And, further, the District Court's Conclusions of Law, Nos. 6 and 7, so found [Tr. pp. 24, 25], supports this contention.

Conceding lunch period time to be time worked for purpose of illustration, the appellants thus worked the fol-

lowing hours: swing shift, 4:30-12:30 = 8 hours X 6 days = 48 hours; graveyard shift, 12:30-8:00 = 7½ hours X 6 days = 45 hours. Therefore, there is no evidence of hours worked by appellants as to the swing or graveyard shifts in excess of forty-eight hours per week for which they were not properly paid; because on both the swing and graveyard shifts they were credited and paid for forty-eight hours of work, with overtime at time and one-half for the eight hours in excess of forty.

Appellant seeks to attack the swing and graveyard rates of pay as mere bookkeeping transactions. The Wage and Hour Administrator made a similar attack in *McComb v. Pacific and Atlantic Shippers Assoc.* (C. C. A. 7th, 1949), 175 F. 2d 411. There the employees were paid on the basis of forty-eight hours worked a week with time and one-half for the eight hours over forty. It was stipulated that the employees worked less than forty-eight hours per week but in excess of forty. The Court held the method of payment did not violate the Fair Labor Standards Act.

Effect of 1949 Amendments to the Fair Labor Standards Act.

The Eighty-first Congress amended the Fair Labor Standards Act in several important particulars by Public Law 393, First Session, effective January 25, 1950.[2]

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[2]These new amendments are discussed since it is assumed the Court will not pass on this case until after the effective date of these new laws.

Section 16(f) of this new law repeals the 1949 Overtime on Overtime Law providing:

> "Public Law 177, Eighty-first Congress, approved July 20, 1949, is hereby repealed as of the effective date of this Act."

Section 16(e) expressly requiring for *retroactive* effect provides:

> "No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949 for such work was at least equal to the compensation which would have been payable for such work had section 7(d)(6) and (7) and section 7(g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment."

Thus, this section relieves appellee if the compensation paid by it was *"at least equal to"* the sum required by Section 7(d)(6) (7) and 7(g). Section 7(d)(6) is believed applicable to the case at bar and provides:

> "Extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the work week, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;"

It will be recalled that premium pay of one and one-half the established hourly rate was paid by appellee for 8 hours on the sixth day of the work week [Ex. 1, par. 4]. This pay for the sixth day more than paid for appellants' overtime hours on the graveyard shift and properly paid appellants for the swing shift. For simplicity of illustration, assume a $1.00 an hour rate:

1. Swing shift pay for sixth day: 8 hours worked (including lunch period) X $1.00 X 1½ = $12.00. Total hours worked in week, 8 hours X 6 = 48; 1½ pay required for 8 hours in excess of 40 which is $12.00. Total pay paid by appellee for work week is $40.00 for first 5 days + $12.00 for sixth day = $52.00. Total pay required by the Act = $52.00.

2. Graveyard shift pay for sixth day: 7½ hours worked (including lunch period) X $1.00 X 1½ = $10.75. Total hours worked in week, 7½ hours X 6 = 45; 1½ pay required for 5 hours in excess of 40 = $7.50. Total pay paid by appellee for work week is $40.00 for first five days + $12.00 for sixth day = $52.00. Total pay required by the Act = $47.50.

It is submitted that these illustrations conclusively show that appellants have been properly paid for their lunch period time, when appellee is credited with the compensation actually paid to appellants, as provided by Section 16(e) of the new law, *supra*.

PART II—CROSS-APPELLANT'S OPENING BRIEF.

I.

Basis of Original and Appellate Jurisdiction.

The statement of appellee and cross-appellant on this subject is set forth in Part I of appellee's Reply Brief, *supra,* and is herein relied upon.

II.

Statement of Cross-Appellant's Case.

A. Questions Involved and How Raised.

(1) Were cross-appellees' activities subject to the Fair Labor Standards Act? This issue is raised by the pleadings and also the Findings of Fact and Conclusions of Law.

(2) Were cross-appellees' activities, while in cross-appellant's employ, in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act? This issue is raised by the pleadings and the Findings of Fact and Conclusions of Law.

(3) Is the lunch period time, claimed as time worked by cross-appellees, a compensable activity by reason of an express provision of the Master Labor Agreement [Ex. 1] within the meaning of Section 2 of the Portal-to-Portal Act of 1947? This issue likewise is raised by the pleadings and the Findings of Fact and Conclusions of Law.

(4) Does Section 2(d) of the Portal-to-Portal Act of 1947 deprive the District Court of jurisdiction of this ac-

tion? This issue is also formed by the pleadings and the Conclusions of Law.[3]

(5) Whether or not there is any evidence in the record at all to support the Findings of Fact [Tr. p. 21] that cross-appellee EDWARD R. BIGGS worked during his lunch period *every* day during his employment by cross-appellant. This issue is formed by the Findings of Fact.

III.
ARGUMENT.

Each of the questions presented by cross-appellant will be argued separately and in the order set forth above, except questions "3" and "4" will be argued as one question.

(a) Are the Cross-Appellees Covered by the Fair Labor Standards Act?

1. Summary of Argument.

Cross-appellees were government contract employees who cannot take advantage of the provisions of the Fair Labor Standards Act since cross-appellees were covered by a special Federal Act regulating their pay. This latter Federal Act was based on the power of the United States Government to administer its own business relations and controls only those who contract with the Government; whereas the Fair Labor Standards Act is an exercise of the commerce power of Congress and is directed toward private industry in general.[4]

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[3]It may be noted that the answer to "3," above, automatically answers this question.

[4]Since the case relied upon had not then been decided, this defense was not raised in the District Court.

2. Argument.

The basis of this contention is set forth in the case of *U. S. Cartridge Company v. Powell* (C. C. 8th 1949), 174 F. 2d 718; cert. granted (U. S. Sup. Ct.) 10/10/49. In that case, an action for overtime wages under the Fair Labor Standards Act, the employees were engaged in the manufacture of munitions for a war contractor employed by the United States Government under a cost-plus-fixed-fee contract. The Walsh-Healey Act (Act of June 30, 1936, 49 Stat. 2036; 41 U. S. C. 35-45; 41 U. S. C. A. 35-45) was expressly made applicable to the contract of the government with this munition war contractor. The Court, evidently raising the point itself, held that the Walsh-Healey Act was applicable to the work of the plaintiff employees and that the Fair Labor Standards Act could not cover their activities; and that the Court, therefore, did not have jurisdiction. The Court concluded that the two acts are divergent and incompatible, stating at page 724:

> "The Walsh-Healey Act is not an exercise by Congress of regulatory power over private industry or employment, nor an act of general application to industry." (Citing authorities.)

In the case at bar, the cross-appellees were engaged in building ships for the United States Government pursuant to contracts between cross-appellant and the United States Maritime Commission [Tr. p. 7]. An exemplar of such contracts by stipulation of the parties [Tr. p. 7] is in evidence as Exhibit A. These were cost-plus-a-fee contracts [Tr. p. 98]. The shipyard was engaged in no activity except the production of these ships for the United States under these contracts [Tr. p. 99].

The government contracts expressly provided that a special Maritime Commission wage statute,[5] enacted to cover Maritime Commission shipbuilding contracts, was applicable to the work under such contracts [Ex. A, p. 29, Article 20]. This wage statute expressly suspended the Eight Hour Laws[6] as amended, providing that "laborers and mechanics" employed by a contractor of the Maritime Commission were to be paid on a "basic rate" of eight hours per day and forty hours per week, and for hours worked over eight a day or forty a week at not less than one and one-half times the basic rate of pay.

Approximately six months later, Congress by Public Law 247[7] expressly required that the Maritime Commission Emergency Shipbuilding Program be subject to the provisions of the above Maritime Commission Wage Statute, proving in part (46 U. S. C. A. 1119(b)):

> "The provisions of . . . the Act of October 10, 1940, Ch. 338, 54 Stat. 1092, shall apply to all activities and functions which the Commission is authorized to perform under Section 1119(a) of this title . . ."

It should be noted that this Public Law 247 is expressly referred to in the Government in Paragraph 1, page 1 of Exhibit A.

This Maritime Commission wage statute is obviously different from the Fair Labor Standards Act in its re-

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[5]This law is set forth in full in the appendix, *infra*, Pub. Law 831, 76th Cong., Act of October 10, 1940, 54 Stat. 1092; 40 U. S. C. A. 326—note thereto.

[6]Public Law 781, 76th Cong.; 40 U. S. C. A. 321, *et seq.*

[7]Public Law 247, 77th Cong., enacted February 6, 1941, 55 Stat. 5, 6; 46 U. S. C. A. 1119 (a) (b).

quirements as to overtime as well as speaking of a "basic rate" rather than a regular rate. It requires "not less than" one and one-half times the basic rate of pay for work in excess of eight hours in a given day and hours in excess of forty in a week whereas the Fair Labor Standards Act has no such requirements. Further, it should be noted it was enacted (1940) after the Fair Labor Standards Act (1938). This wage statute refers and applies only to "laborers or mechanics." The Attorney General has stated that this phrase, as used in the Eight Hour Laws, *supra,* should be given a broad meaning (39 Op. Atty. Gen'l 232). Cross-Appellee Biggs worked in a warehouse issuing parts [Tr. p. 67]. Cross-Appellee Hector was a machinery repairman [Tr. p. 80]. Cross-Appellee Lueder was an electrician repairman [Tr. p. 104]. Cross-Appellee Moreno worked mechanical machinery [Tr. p. 59]. All of these men were doing manual and/or mechanical work and it is submitted that there is no question as to these men falling within the "laborer or mechanic" provisions of this Maritime Commission wage law.

In the *U. S. Cartridge Company* case, *supra,* the concurring opinion (also joined in by the Court) discussed at some length the broad powers conferred upon the Secretary of War by the National Defense Acts;[8] and the Court observed that the effect of these laws was to give the Secretary of War possibly plenary over wages, contractors fees and other contract matters. That these broad powers conferred upon a Secretary of War were a strong

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[8]Act of July 2, 1940, 54 Stat. 712, Ch. 508, 50 U. S. C. A. Appendix, 1171, *et seq.,* 5 U. S. C. A., Sec. 189(a).

argument for ruling the inapplicability of the Fair Labor Standards Act to the contract in that case. Similar national defense powers were given to the Maritime Commission by Congress in May, 1941.[9] This Act gave the Maritime Commission authority to negotiate contracts to build ships without advertisements or bids and upon a cost-plus and negotiated fee basis. This Act further provided in subsection (b) that the Maritime Commission wage law, *supra,* would apply providing (50 U. S. C. A. Appendix 1261(b)):

> "The provisions of Public Law Numbered 831, Seventy-sixth Congress, approved October 10, 1940 (54 Stat. 1092 (note under section 326 of Title 40)) (relating to compensation for all hours worked by laborers and mechanics in excess of eight hours per day or forty hours per week at not less than one-and-one-half times the basic rate of pay), shall apply in respect of any contract negotiated pursuant to subsection (a) hereof."

All of these relevant Maritime Commission statutes pertaining to the special wage provisions were enacted after the Fair Labor Standards Act had become law. Thus, this Court is not faced with the problem confronting the Court in the *U. S. Cartridge Company* case, *supra,* where the Walsh-Healey Act, *supra,* had been enacted prior to

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[9]Act of May 2, 1941, Ch. 84, 55 Stat. 148, as amended June 16, 1942, Ch. 416, 56 Stat. 370; 50 U. S. C. A. Appendix 1261.

the enactment of the Fair Labor Standards Act, thus affording argument that the latter amended the former.

Another parallel to the *U. S. Cartridge Company* case, *supra,* is the fact cross-appellant's contracts with the Maritime Commission required wages to be not less than the rates fixed by the Secretary of Labor under the Bacon-Davis Act[10] and that said rates be posted in the shipyard [Ex. A, Article 19(d) pp. 28-29].

It is submitted that the same considerations and conclusions are present in a comparison of the applicable Maritime Commission laws to the Fair Labor Standards Act as were found by the Court in the *U. S. Cartridge Company* case, *supra;* and that the Fair Labor Standards Act has no application to cross-appellees' claims and therefore the District Court had no jurisdiction of this action.

(b) Are Cross-Appellant's Activities Covered by the Fair Labor Standards Act?

Since cross-appellant completely presented its views upon this issue to the Court in the *Mills* case, *supra,* no argument will be made in this case. It is noted that the United States Supreme Court will in time, *Kennedy v. Silas Mason Co.,* 334 U. S. 249, 92 L. Ed. 1347, 68 S. C. 1031, pass on this question in so far as government contractors are concerned.

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[10]Act of March 3, 1931, 46 Stat. 1494, 40 U. S. C. A. 276(a).

(c) Does the Master Labor Agreement Contain an Express Provision Making Lunch Period Time on the Swing and Graveyard Shifts a Compensable Activity?

1. Summary of Argument.

There is no provision in the Master Labor Agreement [Ex. 1] making the lunch period time compensable as to the swing and graveyard shifts and, therefore, the District Court has no jurisdiction as to these claims under Section 2(d) of the Portal-to-Portal Act of 1947.

2. Argument.

Cross-appellees by Paragraph VII of their complaint [Tr. pp. 4-5] have relied solely on the Master Labor Agreement to support the compensability of their lunch hour claims. This is further shown by the stipulation of the parties as to the issues in this case contained in a pre-trial stipulation [Tr. p. 9].

In the *Mills* case, *supra,* the Court held that Paragraph 4 of the Labor Agreement [Ex. 1] contained an express provision making the lunch period activity compensable. This express provision of Paragraph 4 reads as follows:

> "Overtime at the rate of one and one-half times the established hourly rate shall be paid for all work performed in excess of eight (8) hours per day and forty (40) hours per week."

Further, in that case, the Court held that the provisions of subsection (c) of Paragraph 5 of Exhibit 1, as to lunch period time, could not apply since there was no "employee's time" to eat lunch. Subsection (c) of Paragraph 5 of the Agreement [Ex. 1] provides as to the

swing (second shift) and graveyard (third shift) as follows:

> "Second shift: An eight (8) hour period less thirty minutes for meals on employee's time. Pay for a full second shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus ten per cent (10%).
>
> "Third shift: A seven and one-half (7½) hour period less thirty minutes for meals on employee's time. Pay for a full third shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus fifteen per cent (15%)."

By the above contract clause the lunch period time is not required to be thirty consecutive minutes, nor is there any fixed time required within a given shift that lunch period shall be taken. The reason for this is obvious, since in a large shipyard producing continuously around the clock, lunch periods by necessity would have to be staggered and sometimes broken up because of emergencies. Especially was this true during the war period. Mr. Mowrey, Supervisor of cross-appellee Hector, explained it in his testimony [Tr. p. 147]:

> "Q. Isn't it a fact, Hr. Mowrey, that your standing instructions to all of the men on this type of work were that in case of any emergency repair they must do it immediately? A. That is right.
>
> Q. And that whether they were eating their lunch or whether they were doing anything else? A. That is right and if it did happen during the time they were eating their lunch, then the instruction was to eat that [*sic*] when they got done with the job. They were to go ahead and take their lunch period."

Keeping in mind that in the *Mills* case, *supra,* the Court interpreted the Master Labor Agreement [Ex. 1] as to lunch period compensability on the *day shift* only (8½ hours per day), the issue now before the Court is whether Exhibit 1 contains an express provision as to lunch period time upon the swing and graveyard shifts in the light of Section 2 of the Portal-to-Portal Act of 1947, *supra.* Section 2(a) and 2(a)(1) provides:

> "No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—
>
> (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer;".

Section 2(a) speaks of "any activity" and, therefore, makes no distinction upon the basis of productive and non-productive activities or upon any other basis.

Boerkoel v. Hayes Mfg. Co. (D. C. Mich. 1948), 76 Fed. Supp. 771;

Seese v. Bethlehem Steel Company (D. C. Md., 1947), 74 Fed. Supp. 412 (aff'd 168 F. 2d 258);

Bateman v. Ford Motor Company (D. C. Mich., 1948, 76 Fed. Supp. 178 (aff'd 169 F. 2d 266).

In the *Bateman* case, *supra,* Judge Picard (who originally heard and ruled on the well known *Mt. Clemens Pottery Company* case) stated (p. 180):

> "These provisos applied to any employer liabilities whether based on activities prior to or after the Act's enactment, making the act admittedly retroactive, and furthermore applying with equal force to claims which under previous decisions might have been considered meritorious as well as to fantastic 'windfalls' sought by the great majority of these so-called Portal-to-Portal suits . . ."

Section 2(a)(1), above, as to the issue in this case, requires that the written contract [Ex. 1] contain an express provision making the particular activity claimed compensable. As to this portion of Section 2 of the Portal Act, it was stated in *Newsom v. du Pont de Nemours & Co.* (C. C. A. 6th, 1949), 173 F. 2d 856 (p. 859):

> "In order that activities be expressly compensable under this provision they must be specifically described. A contract which does not refer to and specify the activities for which compensation is to be made does not bring the exception into force."

It is cross-appellant's contention that Paragraph 5(c), *supra,* of the Master Labor Agreement [Ex. 1], *expressly* describes and refers to lunch period time, and *expressly* makes this time a non-compensable "activity" irrespective of what the employee did during his lunch period time. For example, suppose an employee claimed compensation because he voluntarily preferred to work during his lunch period rather than eat lunch, well knowing his employment agreement specifically provided lunch period time would not be compensable. It is submitted that, obviously,

in this illustration the employee could not claim compensation under the Fair Labor Standards Act, as amended.

The case at bar is similar to the above illustration. The cross-appellees knew by their weekly pay checks no compensation was given for the lunch period whether they worked during that portion of their shift or not [Tr. p. 46]. *Cross-appellees were not told by cross-appellant they could not take thirty minutes to eat their lunches during their respective shifts* [Tr. pp. 57; 73-74; 85; 116]. Cross-appellees never complained of this matter at their union meetings [Tr. pp. 48-49, 65, 76, 109-110]. Union stewards were in the shipyard at all times to check on the welfare and working conditions of the employees and the stewards were aware of cross-appellees' lunch period activities [Tr. pp. 43-44, 65, 77, 143-144]. Thus, cross-appellees themselves by their conduct and actions during their employment put the very interpretation upon this labor agreement that cross-appellant now contends to be the correct one.

It is submitted that Paragraph 5(c) of the Labor Agreement constitutes an express provision of a written agreement negativing the compensability of lunch period time within the meaning of Section 2 of the Portal-to-Portal Act of 1947.

Distinguishing the Mills Case.

In the *Mills* case, *supra,* the Court was interpreting the provisions of the Labor Agreement in the light of the day shift only. The day shift, counting the lunch period as time worked, was eight and one-half hours of working time; but in neither the graveyard nor swing shift does the addition of one-half hour lunch time make the total shift working time in excess of eight hours. It is, there-

fore, submitted that the portion of Paragraph 4 (set forth *supra,* p. 16) of the Labor Agreement held to constitute an express provision of compensability in the *Mills* case, *supra,* is not applicable to either the swing or graveyard shifts.

In the *Mills* case, *supra,* the Court was examining the Labor Agreement as to hours worked *in excess* of eight hours per day. In the case at bar, the lunch period time, on the swing and graveyard shifts, is work *under* eight hours a day and therefore the provision in Paragraph 4, *supra,* of the Labor Agreement is not applicable.

Section 2(b) of the Portal-to-Portal Act of 1947, *supra,* provides that the express provision in the written agreement must make the activity compensable during the portion of the *day* in which it was performed providing:

> "For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable."

Thus, to satisfy the requirements of Section 2, the express provision of the contract must relate to payment for activities performed upon a day basis and not upon a basis of activities in excess of forty hours per week.

It is submitted that since the lunch period time on the swing and graveyard shifts was not work in excess of eight hours per day, the Master Labor Agreement [Ex. 1] fails to contain an express provision therein making work performed during the lunch periods a compensable activity; and that, therefore, the District Court is deprived of jurisdiction pursuant to the provisions of Section 2(d) of the Portal-to-Portal Act of 1947.

(d) Is There Any Evidence to Support the Finding That Cross-Appellee Biggs Worked During His Lunch Period Each and Every Day?

1. Argument.

The burden of proof to show hours worked for which not properly compensated is upon the cross-appellee.

Anderson v. Mt. Clemens Pottery Company, 328 U. S. 680, 90 L. Ed. 1515, 66 S. C. 1187.

The District Court found that cross-appellee Biggs was required to work each and every one of his lunch periods by its Findings of Fact No. 7 [Tr. p. 21]. However, the only evidence as to the number of lunch periods Mr. Biggs was required to work in the record of this case is his own testimony. By his own admission, both in his deposition taken before the trial and his testimony at the trial, the evidence establishes that he had at least two lunch periods a week that were entirely free and uninterrupted [Tr. pp. 74-75]. He testified [Tr. p. 75]:

> "Mr. Sanders: More than once a week was his answer. Now I am asking him to give a better estimate if he can, your Honor. A. Well, it is pretty hard to say. As long as it was 'more than once a week,' maybe twice a week. It is more, I guess, than anything else. I didn't keep no permanent record on it."

It is submitted that as to Mr. Biggs a finding of lunch period worked more than four days a week (six-day work week) is not supported by the evidence.

Respectfully submitted,

THELEN, MARRIN, JOHNSON & BRIDGES,
By ROBERT H. SANDERS,
Attorneys for Appellee and Cross-Appellant.

APPENDIX.

Public Law 831, 76th Congress, Act of October 10, 1940, 54 Stat. 1092; 40 U. S. C. A. 326—note thereto.

"That until otherwise provided by law, provisions of law prohibiting more than eight hours' labor in any one day of persons engaged upon work covered by United States Maritime Commission contracts for the construction, alteration, or repair of vessels shall be suspended: Provided, That the wages of every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any such contract shall be computed on a basic rate of eight hours per day and forty hours per week and work in excess of eight hours per day or forty hours per week shall be permitted upon compensation for all hours worked in excess of eight hours per day or forty hours per week at not less than one and one-half times the basic rate of pay.

"Sec. 2. The United States Maritime Commission is hereby authorized to modify its existing contracts for the construction, alteration, or repair of vessels as it may deem necessary to expedite national defense, and to otherwise effectuate the purposes of this act.

"Sec. 3. Nothing in this act shall be construed to modify any contracts between management and labor in shipyards which provide for conditions more favorable to labor than the minimum provisions as to hours per day and hours per week and for overtime provided in this act.

"Sec. 4. The provisions of this act shall terminate June 30, 1942, unless the Congress shall otherwise provide."

(Res. June 16, 1942, c. 416, 56 Stat. 370, extended provisions of said Act Oct. 10, 1940, c. 838, 54 Stat. 1092, until six months after the end of the present war shall have been proclaimed, or such earlier time as Congress by concurrent resolution or the President may designate.)